IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
Notice of Motion No.1695 of 2007
In
Appeal (L) No.428 of 2007
In
Suit No.2792 of 2000

Registrar, Handloom and Textile)
Co-operative Societies,)
Uttar Pradesh, Kabir Bhavan,)
G.T.Road, Kanpur, Uttar Pradesh.).. Appellant

Vs.

1. Dr.Vijay S. Singh,)
Chariman,)

2. Shri Vijaykumar Y. Vichare,)
Financial Advisor,)

3. Shri Shivajirao D.Sonawale,)
Secretary MSRTC)

4. Shri P.M.Salvi,)
G.M.(P&IR), MSRTC)

5. Shri Shivajirao Chavan,)

6. Shri S.R.Kalamankar,)

7. Shri Avinash Jahangirdas,)
All Trustees of the)
Maharashtra State Road)
Transport Corporation)
Contributory Provident Fund,)
created under the Road)
Transport Corporation Act,)
1950 & rules framed thereunder)
having its office at)
Maharashtra Vahatuk Bhavan,)
Dr.Anandrao Nair Marg,)
Mumbai 400 008 and)

8. Dr.Vijay S. Singh, Chairman,)

9. Shri Vijaykumar Y. Vichare,)
Financial Advisor & Chief)

Accountant MSRTC/Secretary)
of the Trust,)

10. Shri Shivajirao D.Sonawale,)
MSRTC/Secretary of the Trust,)

11. Shri M.B.Gajare,)
Labour Commissioner,)

12. Shri Hanumantrao Tate,)

13. Shri Ghanshyam P. Shelar,)

14. Shri Kishore Kanhare,)

15. Shri Sukhdeo Waluba Ghuge,)

All Trustees of the Maharashtra)
State Road Transport)
Corporation Gratuity Fund,)
created under the Road)
Transport Corporation Act,)
1950 & rules framed thereunder)
having its office at)
Maharashtra Vahatuk Bhavan,)
Dr.Anandrao Nair Marg,)
Mumbai 400 008 and).. Respondents
(Org.Plaintiffs)

AND

U.P.Co-operative Spinning Mills)
Federation Ltd., A Cooperative)
Society Registered under the)
U.P.Co operative Societies Act,)
1965 having its registered office)
at B-2, Sarvodaya Nagar,)
Kanpur - 208 005.).. Respondent
(Org.1st Defendant)

AND

M/s.S.R.Textile Suppliers,)
79/75, Bansmandi, Kanpur-208 005,)
Head Office Manu Mansion,)
3rd Floor, 16, Shaheed Bhagat)
Singh Road, Fort, Mumbai.).. Respondent
(Purchaser)

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S/Shri Rakesh Upadhyay i/b Deepak Raut for the

appellant.

S/Shri Zal Andhyarujina with N.R.Mody and Ms Deepali Thakore i/b Rustomji & Ginwala for the respondents.

S/Shri G.R.Joshi with S.N.Vimadalal and Manish Doshi i/b Vimadalal & Co. for the Purchaser.

Shri S.N.Mungekar, Section Officer of Court Receiver present.

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CORAM : R.M.S.KHANDEPARKAR &
D.G.KARNIK, JJ

DATED : 4TH JUNE, 2007

ORAL ORDER: (Per R.M.S.Khandeparkar, J)

1. Heard. The present Notice of Motion is taken out for condonation of delay of 1266 days in filing the appeal against the order dated 16th October, 2003 passed in Suit No.2792 of 2000 along with Suit No.1390 of 2003 and Suit No.648 of 2003. The contention on behalf of the applicant/appellant is that there has been no deliberate or intentional delay in filing the appeal but it was, on account of improper advise given to the advocate, some different proceedings were sought to be initiated. Nevertheless the applicant was bonafide pursuing the remedies and only upon realisation that the impugned order needs to be assailed by way of an appeal in order to obtain proper reliefs in the matter, that the appellant has

preferred the present appeal along with the application for condonation of delay.

2. The learned advocate appearing for the applicant has also submitted that the order which is sought to be challenged has been passed ignoring the mandate of Order 21 Rule 66(2) of the Code of Civil Procedure, 1908, inasmuch as that no notice for settling the terms of proclamation was given to the applicant and therefore, the impugned order and all the proceedings which followed the said order are bad in law and nullity. Reliance is sought to be placed in the decisions in the matters of **Desh Bandhu Gupta v. N.L.Anand & Rajinder Singh,** reported in 1994(1) SCC 131, **Gulabsingh v. Chandrapal Singh & Ors.,** reported in AIR 1987 Bombay 90, **Kiran Singh & Ors. v. Chaman Paswan & Ors.,** reported in AIR 1954 SC 340, and **S.J.S.Business Enterprises (P) Ltd. v. State of Bihar & Ors.,** reported in (2004) 7 SCC 166.

3. Perusal of the affidavit in support of the notice of motion for condonation of delay of 1266 days in filing the appeal discloses that apart from narration of the events from 13th January, 2003 regarding filing of the proceedings till 8th April, 2007 and the averments to the effect that there is no

deliberate and intentional delay in filing the appeal and that the applicant had to go through the documents, the same does not disclose sufficient cause for condonation of such a long period of delay.

4. The events which are referred to in the affidavit in support of the notice of motion read thus:-

"(a)13.01.2003	Three separate order dated 13.01.2003, 29.04.2003 and 02.05.2003 passed by 29.04.2003 the Division Bench in Suit no.2792/2000, 648/2003 and 1390/2003, 02.05.2003 respectively confirming the order dated 03.12.2001 passed by single judge in regard to appointment of court receiver and sale of properties of the Federation.
(b)16.10.2003	Order of Hon'ble Justice Radha Krishnan sanctioning of sale of Plant and Machinery of Etawah Mill.
(c)20.03.2004	S.L.P.was filed against the order dated 13.01.2003, 29.04.2003 and

02.05.2003 in suits no.2792/2000, 648/2003 and 1390/2003 with an application of delay of condonation.

(d)28.04.2004 The Hon’ble Supreme Court vide order dated 28.04.2004 issued notice and stayed the operation of order dated 13.1.2003, 29.4.2003 and 2.5.2003 passed by this Hon’ble Court.

(e) The Hon’ble Supreme Court granted special leave and confirmed the stay. The delay in filing of SLP was also condoned.

(f)06.12.2005 The Hon’ble Supreme Court dismissed above mentioned civil appeal.

(g)March, 2006 There took time to transmit records from Hon’ble Supreme Court to this Hon’ble High Court. After the records came to this Hon’ble Court, the Federation filed notice of motion 1119/2006 in March, 2006 in this Hon’ble Court.

(h)12.04.2006 This Hon’ble Court, Hon’ble Mrs.Justice Nishita Mhatre refused ad-interim relief.

(i)08.05.2006 The Federation filed S.L.P.before Hon’ble Supreme Court challenging above mentioned order dated 12.4.2006 passed by this Hon’ble Court. The Hon’ble Supreme Court passed following order:

(j)-- The Learned counsel for petitioner wants to withdraw petition stating that alternative remedy of L.P.A. shall be availed. The S.L.P. is, accordingly, dismissed as withdrawn.

(k)16.05.2006 Accordingly appeal no.576 of 2006 was filed before this Hon’ble Court challenging order dated 12.4.2006 passed by Hon’ble Mrs.Justice Nishita Mhatre.

(l)---- This Hon’ble Court condoned delay in filing of said appeal no.576/2006.

(m)28.03.2007 This Hon'ble Court allowed to Federation to withdraw the appeal and notice of motion and to file fresh appeal. This Hon'ble Court has also directed to parties to maintain status quo for two weeks from 28.03.2007.

(n)04.04.2007 This appeal was filed in Registry of this Hon'ble Court. A decision was taken to change the advocate.

(o)08.04.2007 No objection was taken from previous advocate and the Vakalatnama was filed by the present counsel."

5. The above narration of events undoubtedly discloses the dates of passing of the orders, filing of the SLP, date of disposal of the SLP, etc. without referring in any manner to the cause for delay in filing the appeal against the order dated 16th October, 2003. The events undoubtedly disclose filing of the SLP against the orders dated 13th January, 2003, 29th April, 2003 and 2nd May, 2003. Undisputedly, all those orders were prior to 16th October, 2003 but the impugned order was passed

definitely prior to the date of hearing of the matter before the Apex Court. The Apex Court issued notices in SLP against the said orders on 28th April, 2004. The Apex Court dismissed the SLP on 6th December, 2005. Even thereafter the proceedings in the form of Notice of Motion No.1119 of 2006 were taken out for setting aside the order dated 16th October, 2003. However, when the matter came up for hearing in the form of Appeal No.576 of 2006 against the order passed in the said Notice of Motion No.1119 of 2006, leave was sought to withdraw the appeal alongwith the Notice of Motion No.1119 of 2006 as the appellant wanted to challenge the order dated 16th October, 2003 by way of appeal. In other words, apart from narration of these events of filing earlier proceedings, no other justification is disclosed for condonation of such a long period of delay.

6. The contention about the wrong advice is purely after thought. The contention about the wrong legal advise has been made for the first time during the course of arguments by the learned advocate for the applicant and it is nowhere reflected from the affidavit in support of the notice of motion for condonation of delay. The paragraph 6 of the said affidavit merely states that "the records of this case

show that the Appellant Registrar came into picture only on 27.06.2006 and 19.01.2007 and it is thereafter taking legal opinion thus Appellant is filing the present appeal". Merely because the present appellant took interest in the matter for the first time on 27th June, 2006 and thereafter sought legal opinion and filed present appeal, that by itself does not amount to say that there was a wrong advise given to the earlier Registrar in the matter in hand. Undoubtedly, the proceedings were initiated in the form of notice of motion but that by itself does not mean that the same was done on a wrong legal advise, unless a specific averment in that regard is made in the affidavit in support of the notice of motion for condonation of delay. It is not known for what purpose and with what intention the proceedings in the form of Special Leave Petition and the Notice of Motion No.1119 of 2006 were initiated by the appellant. The proceedings could have been initiated intentionally to have protracted the litigation or for mere harassment to other party. It would depend upon the facts of the each case. The fact as to whether the proceedings were initiated on wrong legal advise is not a mere conclusion to be drawn but it is to be established by the party by making necessary averment in that regard and disclosing under what circumstances

the proceedings were initiated. In the absence of the relevant materials in that regard the submission that the said proceedings were wrongly filed and the same should be considered as the sufficient cause for condonation of delay cannot be accepted.

7. The Apex Court in **Desh Bandhu Gupta's case (supra),** has held that the service of notice on judgment-debtor in terms of Order 21 Rule 66(2) of the Code of Civil Procedure is mandatory and the sale without such notice may render nullity. In the case in hand, it is the contention across the bar that the applicant was not served with such notice under Order 21 Rule 66(2). It is a matter of record that the terms of proclamation were submitted by the Court Receiver's Report and they were accepted and finalised on 16th October, 2003 by the impugned order in the presence of all the parties including the applicant. The page 59 of the compilation submitted by the learned advocate for the applicant discloses that the notice regarding meeting before the Receiver for finalisation of the terms of proclamation was issued to the applicant. Being so, there was sufficient compliance of the mandate of Order 21 Rule 66(2) of the Code of Civil Procedure and records also disclose that the parties were heard before finalisation of the

terms of proclamation. Hence, the decision of the Apex Court in **Desh Bandhu Gupta's case (supra)** can be of no help to the applicant to contend that the order is nullity on the alleged failure on the part of the Court in issuing the notice. Besides the records apparently disclose that the applicant was present at the time of passing of the order dated 16th October, 2003, and the same evidently reveals that there was sufficient compliance of the Order 21 Rule 66(2) of the Code of Civil Procedure.

8. The Apex Court in **Kiran Singh's case (supra),** had ruled that "it is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, & that its invalidity could be set up whenever and wherever it is sought to be enforced or relief upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties." The ruling relates to a decree which is passed without jurisdiction and therefore a nullity. It does not relate to any irregularity in the proceedings as such.

In any case it has no application to the matter in hand.

9. In **S.J.S. Business Enterprises (P) Ltd.'s case (supra),** in the paragraph 18, the Apex Court there has ruled "adequate publicity to ensure maximum participation of bidders in turn requires that a fair and practical period of time must be given to purchasers to effectively participate in the sale. Unless the subject-matter of sale is of such a nature which requires immediate disposal, an opportunity must be given to the possible purchaser who is required to purchase the property on "as-is-where-is basis" to inspect it and to give a considered offer with the necessary financial support to deposit the earnest money and pay the offered amount, if required." The attention was drawn to the decision while canvassing the argument about the alleged nullity of the impugned order. It would be worthwhile to take note of the observations made by the learned Single Judge while passing the impugned order wherein it has been stated that thus:-

> "Neither the learned Counsel for Defendant No.1 (U.P.Co-operative Spinning Mills Federation Limited), nor the learned Counsel

for the secured creditor (the State Bank of India) is able to bring forth anyone who will be offering above Rs.1,85,00,000/-."

Suffice to take note that the above quoted observations sufficiently justify rejection of the contention on behalf of the applicant regarding the alleged nullity of the order which point was canvassed in an attempt to persuade us to condone the delay and to go into the merits of the case.

10. As regards the decision in **Gulabsingh's case (supra)**, it is a decision by the learned Single Judge of this Court holding that in view of the provisions of Order 21 Rule 65 of the Code of Civil Procedure, it is necessary that every sale in execution of a decree under the Court has to be by way of public auction. In a case where the efforts for sale by public auction fails, the sale by inviting offers by advertisement cannot be found fault with. The records in the case in hand disclose that there was no offer over and above the one for which the property was sold. In this view of the matter, the decision in **Gulabsingh's case (supra)** is of no help to the applicant.

11. It is also to be noted that the Order 21 Rule

78 of the Code of Civil Procedure provides that no irregularity in publishing or conducting sale of immovable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery. Undisputedly, the property which is to be auctioned is a machinery.

12. Since no sufficient cause is disclosed for condonation of delay of 1266 days in filing the appeal, there is no case made out for condonation of delay. Hence, the notice of motion fails and is hereby dismissed.

13. In view of the dismissal of the notice of motion for condonation of delay, the Appeal (L) No.428 of 2006 also stands dismissed.

14. At this stage, after pronouncement of the order, the learned advocate for the applicant has sought leave to produce on record the written submissions. Since the order has already been delivered in the open court, the question of accepting

the written submissions after pronouncement of the order does not arise. Request for taking the written submissions on record is rejected.

15. At this stage, the learned advocate for the applicant prays for stay of the order passed today for a period of two weeks. Since by the order passed today, we have not granted any relief, and therefore, there is no executable order, and hence nothing is to be stayed as such. The request for stay is, therefore, rejected.

16. At this stage, the learned advocate for the applicant prays for stay of handing over of possession pursuant to the sale. Undisputedly, till this date, there was no such order in favour of the applicant after disposal of the Special Leave Petition by the Apex Court on 6th December, 2005. Consequently, the question of granting relief in the nature asked for at this stage does not arise. The request, therefore, is rejected.

(R.M.S.KHANDEPARKAR, J)

(D.G.KARNIK, J)